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CONFERENCE OF THE PARTIES TO THE CONVENTION  
ON BIOLOGICAL DIVERSITY SERVING AS THE  
MEETING OF THE PARTIES TO THE CARTAGENA  
PROTOCOL ON BIOSAFETY

Fourth meeting

Bonn, 12-16 May 2008

Item 12 of the provisional agenda\*

### **FINAL REPORT OF THE OPEN-ENDED AD HOC WORKING GROUP OF LEGAL AND TECHNICAL EXPERTS ON LIABILITY AND REDRESS IN THE CONTEXT OF THE CARTAGENA PROTOCOL ON BIOSAFETY**

#### *Addendum*

### **PROPOSED OPERATIONAL TEXTS ON APPROACHES AND OPTIONS IDENTIFIED PERTAINING TO LIABILITY AND REDRESS IN THE CONTEXT OF ARTICLE 27 OF THE BIOSAFETY PROTOCOL: OUTCOMES OF THE MEETING OF THE FRIENDS OF THE CO-CHAIRS, BONN, 7-10 MAY 2008**

#### *Note by the Executive Secretary*

1. The fifth meeting of the Open-Ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Protocol requested a meeting of the Friends of the Co-Chairs to be convened prior to the fourth meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol to further negotiate the proposed rules and procedures on liability and redress in the context of the Cartagena Protocol on Biosafety.
2. Accordingly, the Friends of the Co-Chairs met in Bonn from 7 to 10 May 2008. The outcomes of the meeting, which reflect only those sections of the texts considered by the group, are annexed hereto. They should be read in conjunction with annex II of the final report of the Working Group (UNEP/CBD/BS/COP-MOP/4/11).
3. This document is being circulated at the request of the Co-Chairs.

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\* UNEP/CBD/BS/COP-MOP/4/1.

*Annex*

**PROPOSED OPERATIONAL TEXTS ON APPROACHES AND OPTIONS IDENTIFIED  
PERTAINING TO LIABILITY AND REDRESS IN THE CONTEXT OF ARTICLE 27  
OF THE BIOSAFETY PROTOCOL**

**ADMINISTRATIVE APPROACH**

**I. STATE RESPONSIBILITY (FOR INTERNATIONALLY WRONGFUL ACTS,  
INCLUDING BREACH OF OBLIGATIONS OF THE PROTOCOL)**

*{See Annex II of document UNEP/CBD/BS/COP-MOP/4/11}*

**II. SCOPE**

**A. Functional scope**

*Operational text 1*

1. These rules and procedures apply to transport, transit, handling and use of living modified organisms [and products thereof], provided that these activities find their origin in a transboundary movement. The living modified organisms referred to are those:

- (a) Intended for direct use as food or feed, or for processing;
- (b) Destined for contained use;
- (c) Intended for intentional introduction into the environment.

2. With respect to intentional transboundary movements, these rules and procedures apply to damage resulting from any authorized use of the living modified organisms [and products thereof] referred to in paragraph 1.

3. These rules and procedures also apply to unintentional transboundary movements as referred to in Article 17 of the Protocol as well as illegal transboundary movements as referred to in Article 25 of the Protocol.

**B. Geographical scope**

*Operational text 2*

These rules and procedures apply to areas within the limits of its national jurisdiction[, including the exclusive economic zone,] [or control] of the Parties to the Protocol.

**C. Limitation in time**

*Operational text 3*

These rules and procedures apply to damage resulting from a transboundary movement of living modified organisms when that transboundary movement was commenced after their implementation by Parties into domestic law.

*Operational text 3 alt*

These rules and procedures apply to damage resulting from a transboundary movement of living modified organisms that started after the entry into force of these rules and procedures.

<b><i>D. Limitation to the authorization at the time of the import of the living modified organisms</i></b>
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*Operational text 4*

[These rules and procedures apply to intentional transboundary movement in relation to the use for which living modified organisms are destined and for which authorization has been granted prior to the transboundary movement. If, after the living modified organisms are already in the country of import, a new authorization is given for a different use of the same living modified organisms, such use will not be covered by these rules and procedures.]

<b><i>E. Non-Parties</i></b>
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*Operational text 5*

1. National rules on liability and redress implementing these rules and procedures should also cover damage resulting from the transboundary movements of living modified organisms from non-Parties, in accordance with Article 24 of the Protocol.
2. These rules and procedures apply to "transboundary movements" of living modified organisms, as defined in Article 3(k) of the Protocol.

<b>III. DAMAGE</b>
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<b><i>A. Definition of damage</i></b>
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*Operational text 6*

1. These rules and procedures apply to damage to the conservation and sustainable use of biological diversity, taking also into account [damage] [risks] to human health[, resulting from transboundary movement of living modified organisms].
2. For the purpose of these rules and procedures, damage to the conservation [and sustainable use] of biological diversity as defined in Article 2 of the Convention on Biological Diversity, means an adverse or negative effect on biological diversity that:
  - (a) Is measurable or otherwise observable taking into account, wherever available, scientifically-established baselines recognized by a competent national authority that takes into account any other human induced variation and natural variation; and
  - (b) Is significant as set out in paragraph 4 below.
3. [For the purposes of these rules and procedures, damage to the sustainable use, as defined in Article 2 of the Convention on Biological Diversity of biological diversity, means an adverse or negative effect on biological diversity that is significant as set out in paragraph 4 below and [may have resulted in loss of income] [has resulted in consequential loss to a state, including loss of income].]
4. A "significant" adverse or negative effect on the conservation and sustainable use of biological diversity as defined in Article 2 of the Convention on Biological Diversity is to be determined on the basis of factors, such as:
  - (a) The long term or permanent change, to be understood as change that will not be redressed through natural recovery within a reasonable period of time;

[(b) The extent of the qualitative or quantitative changes that adversely or negatively affect the components of biological diversity;

(c) The reduction of the ability of components of biological diversity to provide goods and services;]

[(b and c alt) A qualitative or quantitative reduction of components of biodiversity and their potential to provide goods and services;]

[(d) The extent of any adverse or negative effects on human health;]

[(d alt) The extent of any adverse or negative effects of the conservation and sustainable use of biological diversity on human health; ]

[5. Parties may take into account local and regional conditions in order to ensure the workability of domestic liability rules and procedures, provided that this is consistent with the objective and provisions of the Protocol.]

### ***B. Valuation of damage***

#### *Operational text 7*

[1. Damage to conservation and sustainable use of biological diversity shall be valued on the basis of the costs of response measures [in accordance with domestic laws and provisions].

2. For the purposes of these rules and procedures, response measures are reasonable actions to:

(i) [prevent,] minimize or contain damage, as appropriate;

[(ii) restore to the condition that existed before the damage or the nearest equivalent, by the replacement of the loss by other components of the biological diversity at the same location or for the same use or at another location or for another type of use.]]

### ***C. Causation***

#### *Operational text 8*

A causal link needs to be established between the damage and the activity in question in accordance with domestic law.

## **IV. PRIMARY COMPENSATION SCHEME**

### ***A. Elements of Administrative Approach based on allocation of costs of response measures and restoration measures***

#### *Operational text 9*

Parties [may][shall][, as appropriate,] [, consistent with international [law] obligations,] provide for or take response measures in accordance with domestic law or[, in the absence thereof,] the procedures specified below, [provided that the domestic law is consistent with the objective of these rules and procedures].

#### *Operational text 10*

In the event of damage or imminent threat of damage, an operator [shall][should] immediately inform the competent authority of the damage or imminent threat of damage.

*Operational text 10 alt*

The Parties should endeavor to require the operator to inform the competent authority of an accident which causes or threatens to cause significant adverse damage to the conservation and sustainable use of biological diversity.

*Operational text 11*

In the event of damage [or imminent threat of damage], an operator shall, subject to the requirements of the competent authority, investigate, assess and evaluate the damage [or imminent threat of damage] and take appropriate response measures.

[In cases where no response measures can be implemented, the operator shall provide monetary compensation for the damage caused [where applicable under the domestic law].]

*Operational text 11 alt*

The Parties should endeavor to require any legal or natural person who caused significant damage by that person's intentional or negligent act or omission regarding the transboundary movement to undertake reasonable response measures to avoid, minimize or contain the impact of the damage.

*Operational text 12*

[1. The competent authority:

a) [should][shall] identify, in accordance with domestic law, the operator which has caused the damage [or the imminent threat of damage];

b) [should][shall] assess the significance of the damage and determine which response measures should be taken by the operator.]

2. The competent authority has the discretion to implement appropriate measures[, in accordance with domestic law, if any, including in particular] where the operator has failed to do so.

3. The competent authority has the right to recover the costs and expenses of, and incidental to, the implementation of any such appropriate measures, from the operator.

*Operational text 13*

“Operator” means any person in [operational control][[direct or indirect] command or control]:

(a) of the activity at the time of the incident [causing damage resulting from the transboundary movement of living modified organisms];

[(b) of the living modified organism [at the time that the condition that gave rise to the damage] [or imminent threat of damage] arose [including, where appropriate, the permit holder or the person who placed the living modified organism on the market];] [and/]or

(c) as provided by domestic law.

*Operational text 13 alt*

“Operator” means the developer, producer, notifier, exporter, importer, carrier, or supplier.

*Operational text 13 alt bis*

“Operator” means any person in operational control of the activity at the time of the incident and causing damage resulting from the transboundary movement of living modified organisms.

*Operational text 14*

Decisions of the competent authority imposing or intending to impose response measures should be reasoned and notified to the operator who should be informed of the procedures and legal remedies available to him, including the opportunity for the review of such decisions, *inter alia*, through access to an independent body, such as courts.

<b><i>Abis. Additional Elements of an Administrative Approach</i></b>
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<b>1. Exemptions or mitigation</b>
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*Operational text 15*

[Domestic law may provide for] exemptions or mitigations [that] may be invoked by the operator [in the case of recovery of the costs and expenses]. Exemptions or mitigations [may be][are] based on [any one or more elements of] the following [exhaustive] list:

- (a) Act of God or *force majeure*;
- (b) Act of war or civil unrest;
- [(c) Intervention by a third party [that caused damage despite the fact that appropriate safety measures were in place];]
- [(d) Compliance with compulsory measures imposed by a public authority;]
- [(d alt) A specific order imposed by a public authority on the operator and the implementation of such order caused the damage;]
- [(e) An activity expressly authorized by and fully in conformity with an authorization given under domestic law;]
- [(f) An activity not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the activity was carried out;]
- [(g) National security exceptions [or international security]].

<b>2. Recourse against third party by the person who is liable on the basis of strict liability</b>
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*Operational text 16*

These rules and procedures do not limit or restrict any right of recourse or indemnity that an operator may have against any other person.

<b>3. Limitation of liability</b>
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**a. Limitation in time (relative time-limit and absolute time-limit)***Operational text 17*

Domestic law may provide for relative and/or absolute time limits for the recovery of costs and expenses[, provided that such limits shall not be less than [three] years for relative time limit and [twenty] years for absolute time limit].

**b. Limitation in amount**

*Operational text 18*

Domestic law may provide for financial limits for the recovery of costs and expenses[, provided that such limits shall not be less than [z] special drawing rights].

**4. Coverage**

*Operational text 19*

1. [Parties may[, consistent with international [law][obligations],] require the operator to establish and maintain, during the period of the time limit of liability, financial security, including through self-insurance.]

2. [Parties are urged to take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under domestic measures implementing these rules and procedures.]

**V. SUPPLEMENTARY COMPENSATION SCHEME**

*{See Annex II of document UNEP/CBD/BS/COP-MOP/4/11}*

**VI. SETTLEMENT OF CLAIMS**

*{See Annex II of document UNEP/CBD/BS/COP-MOP/4/11}*

**VII. COMPLEMENTARY CAPACITY-BUILDING MEASURES**

*{See Annex II of document UNEP/CBD/BS/COP-MOP/4/11}*

**VIII. CHOICE OF INSTRUMENT**

*{See Annex II of document UNEP/CBD/BS/COP-MOP/4/11}*

## CIVIL LIABILITY

### I. STATE RESPONSIBILITY (FOR INTERNATIONALLY WRONGFUL ACTS, INCLUDING BREACH OF OBLIGATIONS OF THE PROTOCOL)

{See Annex II of document UNEP/CBD/BS/COP-MOP/4/11}

### II. SCOPE

{See administrative approach}

### III. DAMAGE

#### A. Definition of damage

*Operational text 1*

[1. These rules and procedures apply to damage [resulting from the transboundary movement of living modified organisms] as provided for by domestic law.]

[2. For the purposes of these rules and procedures, damage [resulting from the transboundary movement of living modified organisms] as provided for by domestic law may, *inter alia*, include:

(a) Damage to the conservation and sustainable use of biological diversity not redressed through the administrative approach {see administrative approach};

(b) Damage to human health, including loss of life and personal injury;

(c) Damage to or impaired use of or loss of property;

(d) Loss of income and other economic loss [resulting from damage to the conservation or sustainable use of biological diversity];

[(e) Loss of or damage to cultural, social and spiritual values, or other loss or damage to indigenous or local communities, or loss of or reduction of food security.]]

#### B. Valuation of damage

*Operational text 2*

[1. Damage [resulting from the transboundary movement of living modified organisms] [shall][should] be valued in accordance with domestic laws and procedures, including factors such as:]

(a) The costs of response measures [in accordance with domestic law and [procedures] [regulations]];

[(b) The costs of loss of income related to the damage during the restoration period or until the compensation is provided;]

[(c) The costs and expenses arising from damage to human health including appropriate medical treatment and compensation for impairment, disability and loss of life;]

[(d) The costs and expenses arising from damage to cultural, social and spiritual values, including compensation for damage to the lifestyles of indigenous and/or local communities.]

/...



2. In the case of centres of origin and/or genetic diversity, their unique value should be considered in the valuation of damage, including incurred costs of investment.
3. For the purposes of these rules and procedures, response measures are reasonable actions to:
  - (i) [prevent,] minimize or contain damage, as appropriate;
  - [(ii) restore to the condition that existed before the damage or the nearest equivalent, by the replacement of the loss by other components of the biological diversity at the same location or for the same use or at another location or for another type of use.]]

### *C. Causation*

#### *Operational text 3*

A causal link between the damage and the activity in question as well as the related allocation of the burden of proof to either the claimant or the respondent needs to be established in accordance with domestic law.

## **IV. PRIMARY COMPENSATION SCHEME**

### *A. Civil Liability (harmonization of rules and procedures)*

#### *Operational text 4*

Parties [may][shall][should] have civil liability rules and procedures for damage [resulting from the transboundary movement of living modified organisms] in accordance with domestic law. Parties [should consider the inclusion of][shall include][may include] the following [minimum] elements and procedures.

#### **1. Standard of liability and channelling of liability**

#### *Operational text 5*

[The standard of liability, whether fault-based liability, strict liability or mitigated strict liability, needs to be established in accordance with domestic law.]

#### **Option 1: Strict liability**

#### *Operational text 6*

[The operator [shall][should] be liable for damage [under these rules and procedures][resulting from transport, transit, handling and/or use of living modified organisms that finds its origin in such movements], regardless of any fault on his part.]

{“Operator” see administrative approach}

#### **Option 2: Mitigated strict liability**

#### *Operational text 7*

[1. A fault-based standard of liability [shall][should][may] be used except a strict liability standard [should][shall] be used in cases [such as] where[:]

- [(a) a risk-assessment has identified a living modified organism as ultra-hazardous; and/or]
- [(b) acts or omissions in violation of national law have occurred; and/or]
- [(c) violation of the written conditions of any approval has occurred.]

2. In cases where a fault-based standard of liability is applied, liability [shall][should] be channeled to the [entity having operational control][operator] of the activity that is proven to have caused the damage, and to whom intentional, reckless, or negligent acts or omissions can be attributed.

3. In cases where a strict liability standard has been determined to be applicable, pursuant to *paragraph 1 above*, liability shall be channeled to the [entity that has operational control][operator] over the activity that is proven to have caused the damage.]

### **Option 3: Fault-based liability**

#### *Operational text 8*

[In a civil liability system, liability is established where a person:

- (a) Has operational control of the relevant activity;
- (b) Has breached a legal duty of care through intentional, reckless or negligent conduct, including acts or omissions;
- [(c) Such breach has resulted in actual damage to biological diversity; and]
- (d) Causation is established in accordance with section [ ] of these rules.]

<b>2. The provision of interim relief</b>
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#### *Operational text 9*

Any competent court or tribunal may issue an injunction or declaration or take such other appropriate interim or other measure as may be necessary or desirable with respect to any damage or imminent threat of damage.

<i>Abis. Additional Elements of Civil Liability</i>
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<b>1. Exemptions or mitigation</b>
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#### *Operational text 10*

[Domestic law may provide for] exemptions or mitigations [that] may be invoked by the operator in the case of strict liability. Exemptions or mitigations [may be][are] based on [any one or more elements of] the following [exhaustive] list:

- (a) Act of God or *force majeure*;
- (b) Act of war or civil unrest;
- [(c) Intervention by a third party [that caused damage despite the fact that appropriate safety measures were in place];]
- [(d) Compliance with compulsory measures imposed by a public authority;]
- [(d alt) A specific order imposed by a public authority on the operator and the implementation of such order caused the damage;]
- [(e) An activity expressly authorized by and fully in conformity with an authorization given under domestic law;]
- [(f) An activity not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the activity was carried out;]
- [(g) National security exceptions [or international security];]
- [(h) Where the operator could not have reasonably foreseen the damage.]

## **2. Recourse against third party by the person who is liable on the basis of strict liability**

### *Operational text 11*

These rules and procedures do not limit or restrict any right of recourse or indemnity that an operator may have against any other person.

## **3. Joint and several liability or apportionment of liability**

### *Operational text 12*

In case two or more operators have caused the damage, joint and several liability or apportionment of liability may, as appropriate, apply in accordance with domestic law.

### *Operational text 12 alt*

1. If two or more operators [are][may be] liable according to these rules and procedures, the claimant [should][shall] have the right to seek full compensation for the damage from any or all such operators, i.e., may be liable jointly and severally [without prejudice] [in addition][subject] to domestic laws providing for the rights of contribution or recourse.

2. If damage results from an incident that consists of a continuous occurrence, all operators involved successively in exercising the control of the activity during that occurrence shall be jointly and severally liable. However, the operator who proves that the occurrence during the period when he was exercising the control of the activity caused only a part of the damage shall be liable for that part of the damage only.

[3. If damage results from an incident that consists of a series of occurrences having the same origin, the operators at the time of any such occurrence shall be jointly and severally liable. However, any operator who proves that the occurrence at the time when he was exercising the control of the activity caused only a part of the damage shall be liable for that part of the damage only.]

4. Where the claim for damage has not been satisfied, the unsatisfied portion shall be fulfilled by any other person[, identified by the operator,] whose activity has contributed to the occurrence of the damage resulting from the transboundary movement.

## **4. Limitation of liability**

### **a. Limitation in time (relative time-limit and absolute time-limit)**

#### *Operational text 13*

Domestic law may provide for relative and/or absolute time limits for the submission of claims in the case of civil liability[, provided that such limits shall not be less than:

(a) [three] years from the date the claimant knew or reasonably could have known of the damage and its origin; and/or

(b) [fifteen] years from the date of the occurrence of the damage].

### **b. Limitation in amount**

#### *Operational text 14*

[Domestic law may provide for financial limits for strict liability[, provided that such limits shall not be less than [z] special drawing rights].]

## 5. Coverage

### *Operational text 15*

1. [Parties may[, consistent with international [law][obligations],] require the operator to establish and maintain, during the period of the time limit of liability, financial security, including through self-insurance.]
2. [Parties are urged to take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under domestic measures implementing these rules and procedures.]

## V. SUPPLEMENTARY COMPENSATION SCHEME

*{See Annex II of document UNEP/CBD/BS/COP-MOP/4/11}*

## VI. SETTLEMENT OF CLAIMS

*{See Annex II of document UNEP/CBD/BS/COP-MOP/4/11}*

## VII. COMPLEMENTARY CAPACITY-BUILDING MEASURES

*{See Annex II of document UNEP/CBD/BS/COP-MOP/4/11}*

## VIII. CHOICE OF INSTRUMENT

*{See Annex II of document UNEP/CBD/BS/COP-MOP/4/11}*

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